



City Council Memorandum

ISSUE

The issue for City Council consideration is approval of the First Amendment to the Settlement, Release, and Indemnification Agreement and the First Amendment to the On-Site Escrow Agreement with Rohr Inc. The City Council approved the Agreements on April 11, 2006 to further the City of Riverside's efforts to address environmental conditions on and off the Agricultural Park site. The First Amendments would extend the term of the Agreements by five (5) years through April 11, 2014.

RECOMMENDATIONS:

That the City Council:

1. Approve the First Amendment to the Settlement, Release, and Indemnification Agreement and the First Amendment to the On-Site Escrow Agreement with Rohr Inc.; and
 2. Authorize the City Manager, or his designee, to execute the Amendments and any and all documents necessary to comply with the terms of the Amendments.

BACKGROUND

The Agricultural Park (Ag Park), formerly owned by the City and transferred to the Friends of Riverside Airport (FRA) by City Council action on April 8, 2003, contained a sewage treatment plant (Arlanza Treatment Plant) operated by various entities from approximately 1942 to 1965. In July 2003, the City discovered the presence of polychlorinated biphenyls (PCBs) in the abandoned treatment plant facilities, debris and soils on and around the Ag Park site. The City characterized the area in and around the site for PCBs.

FRA is contractually obligated to remediate the site under the oversight of the California Environmental Protection Agency Department of Toxic Control Substances (DTSC). The City is working with DTSC to determine if there are any offsite matters requiring remediation.

The City conducted an investigation to identify potentially responsible parties for the presence of PCBs on and around the Ag Park. The intent of the investigation was to obtain evidence that would assist the City in holding potentially responsible parties liable for their share of the PCB remediation costs and other damages. Under the Comprehensive Environmental Responsibility and Reimbursement Liability Act of 1980, as amended CERCLA, and other applicable federal and state laws, Riverside is entitled to obtain reimbursement and damages for the cost of PCB remediation from potentially responsible parties.

During the investigation, it became known to the City that Rohr Inc. used PCBs at its site during the time the sewer plant was in operation. Although Rohr has declared it is not responsible for the PCBs now at the Ag Park, the City and Rohr entered into a Settlement, Release, and Indemnification Agreement (Agreement) for the purpose of settling potential claims, demands, and causes of action (administrative, judicial, or otherwise) between them with respect to the site and PCB contamination migrating from the site to off-site and in order to avoid the expense, uncertainty, and delay of litigation. The key provisions of the Agreement are contained in Table 1. The Agreement was approved by the City Council on April 11, 2006. The City and Rohr also entered into an On-Site Escrow Agreement for Rohr to deposit their share of the clean up costs in an escrow account.

The timing for performance under the Agreement complemented the First Amendment to the Exchange, Disposition and Development Agreement (Development Agreement) between the City, FRA, Van Buren Golf Center, LLC, and Riverside Gateway Plaza, LLC, approved by the City Council on April 11, 2006. The First Amendment required FRA, with DTSC oversight to remediate the Ag Parcel within three (3) years of the First Amendment effective date. The failure of FRA to complete remediation of the site and provide a NFA letter within three (3) years of the Agreement execution date (April 11, 2006) constituted grounds for termination of the On-Site provisions of the Agreement including the return of funds in the escrow account to Rohr.

Due to the litigation filed against the Development Agreement and tract maps associated therewith, FRA was delayed by approximately twenty (20) months in performing the remediation of the Ag Park. On September 10, 2008, FRA re-affirmed its commitment to cleanup the Ag Park through a two phased process. In connection with the phased clean up of the Ag Park, a Second Amendment to the Development Agreement was approved by the City Council on February 17, 2009.

Due to the delay in FRA's clean up of the Ag Park caused by the lawsuit, and given the fact that FRA is moving ahead with site remediation in accordance with the Second Amendment to the Development Agreement, the City and Rohr propose to amend the Agreement and the Escrow Agreement to also extend their terms. It is in the City's best interest to amend the Agreement and the Escrow Agreement with Rohr to reflect the new remediation time frames. The proposed First Amendments would extend the term of the Agreement and On-Site Escrow Agreement by five (5) years through April 11, 2014.

FISCAL IMPACT:

The First Amendment to the Settlement, Release, and Indemnification Agreement extends the term of the agreement to April 11, 2014. The fiscal impact of the First Amendment to the Settlement Agreement depends on several variables, notably the ability of the FRA to clean the site to a level acceptable for the issuance of an On-Site No Further Action Letter by DTSC and the extent of off-site remediation required by DTSC, if any, and its associated cost, ultimately culminating in the issuance of an Off-Site No Further Action Letter.

Under the anticipated scenario, FRA would comply with the terms of the Second Amendment to the Exchange, Disposition and Development Agreement including removal of TSCA material by June 30, 2009; receipt of DTSC certification of Phase 1 work by September 30, 2009; and completion of Phase 2 work by June 30, 2012 to a level satisfactory to DTSC. If this occurs, Rohr would release \$1.5 million from escrow to the City of Riverside upon issuance of an On-Site No Further Action Letter. This funding would cover the estimated \$1.5 million dollars spent by the City from July 2003 to present on initial cleanup, site characterization, investigation, DTSC oversight and related activities.

In terms of off-site remediation, the belief at this point is that minimal cleanup would be required by DTSC, if any, and the funding of up to \$3.0 million contributed equally by Rohr and the City under the terms of the Agreement would not be expended. If off-site clean up costs are higher than \$3.0 million, the off-site provision of the Agreement would terminate and the City would retain the ability to make any claims regarding future costs for off-site remediation from responsible third parties. The Agreement also provides for a \$150,000 contribution by Rohr toward the purchase of a joint City/Rohr Pollution Legal Liability (PLL) insurance policy for both on and off-site matters or a \$150,000 contribution toward the City's purchase of its own PLL insurance.

Prepared by: Siobhan Foster, Public Works Director

Certified as to:

availability of funds:

Approved by:

Approved as to form:

Paul C. Sundeep, Assistant City Manager/CFO/Treasurer.

Belinda J. Graham, Assistant City Manager

for Bradley J. Hudson, City Manager

Gregory P. Pilamos, City Attorney

Attachments:

1. Summary of Key Provisions
2. First Amendment to the Settlement, Release, and Indemnification Agreement and the First Amendment to the On-Site Escrow Agreement with Rohr Inc.

Table 1**Settlement, Release, and Indemnification Agreement—Summary of Key Provisions**

| Section, Title, Page | Description |
|---|---|
| Payment to City: On-Site Remediation Section 3.1, pp. 4-5 | <ul style="list-style-type: none"> o Within 10 calendar days of Agreement execution, Rohr must place \$1.5 million into On-Site Escrow account. o Upon issuance of On-Site No Further Action Letter from DTSC, Rohr must release funds held in escrow to City. o Should Developer fail to cleanup the site or DTSC fail to issue No Further Action Letter within 3 years of Agreement execution, funds held in escrow would be returned to Rohr & provisions of Agreement pertaining to On-Site terminated. |
| Payment to City: Off-Site Remediation Section 4.1, pp. 5-7 | <ul style="list-style-type: none"> o Rohr would share costs of Off-Site remediation on a 50/50 basis up to a total amount of \$3 million with City & Rohr each contributing up to \$1.5 million. o Within 10 calendar days of regulatory agency approval of Off-Site Remedial Action Plan (RAP), Rohr must place 50% of estimated cleanup costs into Off-Site Escrow account & make payments to City upon presentation of invoices for internal & external costs. o Internal costs would be limited to \$125,000. o Upon issuance of Off-Site No Further Action Letter from DTSC, any remaining funds held in escrow would be returned to Rohr. |
| Limit to Off-Site Costs Section 4.6, p. 7 | <ul style="list-style-type: none"> o Rohr's obligation to pay ongoing costs of Off-Site remediation & Rohr's contribution to Off-Site escrow would not exceed \$1.5 million. o If cost to complete Off-Site remediation exceeds \$3.0 million, provisions of the Agreement pertaining to the Off-Site would be terminated unless the parties agree in writing to modify the Agreement. o At point of termination, each party would reserve all rights & retain ability to make any claims or pursue any negotiations regarding future costs for further Off-Site remediation. o After expenditure of \$3.0 million, both parties would release each other from any claim for & waive right to recover any of costs already expended for Off-Site remediation before termination of Agreement. |
| Waste Manifests Section 5.3, p. 8 & Section 6.3, p. 9 | <ul style="list-style-type: none"> o Rohr would not be listed on any manifests regarding wastes removed from On-Site or Off-Site. o Rohr would not be deemed the "generator" of any materials removed from On-Site or Off-Site. |

| Section, Title, Page | Description |
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| Release of Claims by City On-Site Section 7, pp. 9- 10 | <ul style="list-style-type: none"> o Upon City's receipt of On-Site No Further Action Letter from DTSC & City's receipt of \$1.5 million from On-Site escrow account, City would forever & completely release & discharge Rohr from all claims or any other liability whatsoever including but not limited all environmental liabilities & consequential costs in any way related to release of hazardous materials On-Site whether known or unknown. o Release would not extend to category of claims relating to On-Site—toxic tort, personal injury or property damage claims brought by persons other than City or Developer & claims for natural resource damage. o Should the provisions of the Agreement concerning On-Site be terminated, City would reserve whatever legal rights & claims it may have against Rohr & other parties |
| Release of Claims by City Off-Site Section 8, p. 10 | <ul style="list-style-type: none"> o Upon City's receipt of Off-Site No Further Action Letter from DTSC, City would forever & completely release and discharge Rohr from all claims including but not limited to environmental liabilities & consequential costs in any way related to hazardous materials released at & migrating from Site to Off-Site locations identified in the Off-Site RAP whether known or unknown. o Release would not extend to category of claims relating to Off-Site—toxic tort, personal injury or property damage claims brought by persons other than City or Developer & claims for natural resource damage. o Should the provisions of Agreement concerning Off-Site be terminated, City would reserve whatever legal rights & claims it may have against Rohr & other parties |
| Release of Claims by Developer Section 9, pp. 10- 11 | <ul style="list-style-type: none"> o Within 60 days of execution of Agreement, City must cause Developer to execute written release of claims in favor of Rohr o Should City fail to perform this covenant, Rohr may terminate Agreement |
| On-Site Indemnification & Financial Assurance Section 10, p. 11 | <ul style="list-style-type: none"> o Except for claims not released in Agreement & effective upon the City's receipt of On-Site No Further Action Letter, City would indemnify, defend, & hold harmless Rohr from all liabilities related to hazardous materials found On-Site o City must also require Developer to post performance bond or similar financial assurance to ensure completion of site mediation |

| Section, Title, Page | Description |
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| Environmental Insurance: Section 11, pp. 11 -12 | <ul style="list-style-type: none"> o Parties would make reasonable efforts to obtain Pollution Legal Liability (PLL) insurance for Site & Off-Site with Rohr taking lead o Rohr must investigate 2 options for PLL insurance—single policy naming both City & Rohr as insured and 2 PLL insurance policies that separately provide coverage for Rohr & City o Each party retains right to elect whether to obtain joint or separate coverage o If parties agree to purchase joint PLL insurance policy, Rohr would pay first \$150,000 of one-time premium with 50/50 split of remaining cost of premium. o If parties agree not to purchase joint PLL insurance & City selects to purchase own PLL insurance, Rohr must contribute \$150,000 toward cost of City's one-time premium. |
| No Admission of Liability Section 16 | <ul style="list-style-type: none"> o Parties make no admissions of fact or law o Intent of parties that Agreement not establish or be used by either party or any third parties as precedent or admission of liability |

FIRST AMENDMENT AND EXTENSION OF SETTLEMENT, RELEASE, AND INDEMNIFICATION AGREEMENT

This First Amendment and Extension of Settlement, Release, and Indemnification Agreement ("Amendment") is entered into on this ~~20~~ day of March, 2009, by and among Rohr, Inc., a Delaware Corporation ("Rohr"), and the City of Riverside, California (the "City"). The City and Rohr are referred to as "the Parties." The Parties make this Amendment to the Settlement, Release, and Indemnification Agreement entered into by the Parties on April 11, 2006 (the "Agreement").

RECITALS

- A. The Parties entered into the Agreement on April 11, 2006.
- B. The Agreement provides for a three year time period starting April 11, 2006 at the end of which the On-Site escrow funds would be disbursed automatically to Rohr.
- C. The three year time period will end on April 11, 2009.
- D. The Agreement provides that the Parties may agree to extensions of the three year time period, provided that the extensions are in writing signed by both Parties, and that the On-Site Escrow agreement is amended in writing accordingly.
- E. The Parties wish to extend the three year period for an additional five years, so that it will end on April 11, 2014, allowing additional time for remediation of the On-Site.
- F. The Agreement also provides that the Parties shall use commercially reasonable efforts to obtain PLL Insurance for the On-Site and the Off-Site.
- G. Following execution of the Agreement in 2006, the Parties mutually agreed to defer obtaining PLL Insurance, and have not yet obtained such insurance.
- H. The Parties wish to amend the provision relating to PLL Insurance such that the Parties are not required to obtain such PLL Insurance, but may elect to do so.

AGREEMENT

NOW, THEREFORE, for good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Parties hereby agree as follows:

1. **Incorporation of Recitals.** The Parties incorporate into this Amendment the recitals set forth above as part of the terms of the Agreement. The recitals are "recitals" within the meaning of Evidence Code § 622.
2. **Extension of Time.** All references to a three year period in the Agreement are deemed to read and to be references to an eight year period starting April 11, 2006.

3. **Additional Five Years for Cleanup.** In particular, but not exclusively, the references to a three year period contained in paragraphs 3.1.3 (Section 3. Payment to City: On-Site Remediation), 3.1.4 (same), and 25.2 (Section 25. Modification and Termination) are deemed to read and to be references to an eight year period ending on April 11, 2014.
4. **On Site Escrow.** The Parties agree to amend in writing the On-Site Escrow agreement set forth in Exhibit B of the original Agreement such that all references to the three year period in the On-Site Escrow agreement are deemed to read and to be references to an eight year period ending on April 11, 2014.
5. **PLL Insurance.** Paragraph 11.1 is amended to read:

The Parties may elect to investigate the availability of PLL Insurance for the On-Site and the Off-Site. In the event they elect to do so, Rohr shall take the lead in investigating the availability, terms and pricing of PLL Insurance. The City shall cooperate by making available documents, reports and other information requested by PLL Insurance carriers in order to obtain quotes on premiums for PLL Insurance. The City shall not independently contact a broker to investigate PLL Insurance, but shall coordinate with Rohr and the broker selected by Rohr.

6. **Savings Clause.** All other provisions of the Agreement remain in full force and effect except as modified herein. Capitalized terms in this Amendment have the same meanings given to them in the original Agreement.
7. **Authority to Execute.** The Parties warrant and represent that each of the persons executing this Amendment on behalf of a legal entity (i) has been authorized to do so by the entity on whose behalf it is being signed, and (ii) has the authority to bind the signatory Party for what he or she is signing to the performance of its obligations under this Amendment and the Agreement.

IN WITNESS WHEREOF this Amendment has been executed by the Parties on the day and year indicated below,

Dated: _____

The City of Riverside
By: _____
Print Name: _____
Title: _____

Dated: 3/20/2009

Rohr, Inc.
By: M. D. M.
Print Name: Marcus D. M.
Title: V.P./Ceo

JX 334349 6
CA 03-191813

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FIRST AMENDMENT TO ON-SITE ESCROW AGREEMENT

This First Amendment to On-Site Escrow Agreement (the "Amendment to Escrow Agreement") is entered into as of March 20, 2009, by and among Rohr, Inc., a Delaware corporation ("Rohr"), the City of Riverside, California (the "City"), and Chicago Title Company ("Escrow Holder") (collectively, "the Parties"). This Amendment to Escrow Agreement is made to extend the On-Site Escrow Agreement dated April 11, 2006 ("Escrow Agreement"), related to the On-Site Escrow described therein, escrow account no. 57009687, for a period of five years.

The Parties agree as follows:

1. Section 3(b) of the Escrow Agreement, titled Outside Termination Date is hereby amended and replaced with the following provision:

(b) Outside Termination Date. Notwithstanding Section 3(a) above, if the City has not obtained and provided to Escrow Holder and Rohr the On-Site No Further Action Letter in accordance with Section 3 of the Settlement Agreement on or before the date that is the eighth (8th) anniversary of the Effective Date, which anniversary is April 11, 2014, then this Agreement shall terminate and Escrow Holder shall promptly return the funds, together with any interest earned on the funds, from the On-Site Escrow to Rohr, by wire transfer of federal funds to a wire transfer address designated by Rohr. Escrow Holder shall be empowered to rely on this Section 3(b) without any further instruction, authorization or consent from either Rohr or the City and despite unilateral directions to the contrary from either Rohr or the City, unless the Escrow Holder receives a written amendment to this Agreement signed by both Rohr and the City extending the termination date.

2. All other provisions of the Escrow Agreement remain in full force and effect except as modified above.

The parties have executed this Agreement as of March 20, 2009.

ESCROW HOLDER:

Chicago Title Company

By: _____
Its: Andrea O'Sullivan

City of Riverside:

By: _____
Its: _____

ROHR:

Rohr, Inc.,
a Delaware corporation

By: Mary Dill
Its: V.P./CFO

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APPROVED AND AGREE
John Smit

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